

March 15, 2013

Chairman Lance Kinzer
Kansas Statehouse, RM 165-W
300 SW 10th St.
Topeka, KS 66612

Re: Neutral Principles approach in church property disputes

Dear Chairman Kinzer, Ranking Member Pauls, and Judiciary Committee Members:

I am writing as a proponent of the Neutral Principles approach in church property disputes. My testimony is based on my own experience and is tendered in my individual capacity; it does not represent the views of any clients or my law firm.

By way of background, I received my undergraduate degree from Duke University in 1977, and my law degree from the Harvard Law School in 1980. I clerked for Chief Justice Joe Greenhill of the Texas Supreme Court, and then practiced law with the Andrews Kurth law firm in Houston for seven years. I spent the next 20 years as a judge: of a civil district court in Houston (1989-2000), as a member and then chief justice of intermediate appellate courts in Houston (2001-2003), and for six years as a member of the Texas Supreme Court (2003-09). During those years I presided over almost 700 trials (454 to jury verdict), and authored 600 appellate opinions. I am licensed to practice law in Texas, and am board certified in Civil Trial, Personal Injury, and Civil Appellate law by the Texas Board of Legal Specialization.

In 2009, I retired from the bench and returned to private practice with Andrews Kurth LLP, where I am head of the appellate section. In that capacity, I have represented the Episcopal Diocese of Fort Worth since 2009 in a suit filed against it by the national association, The Episcopal Church. I argued that appeal in the Texas Supreme Court on October 16, 2012, and we are awaiting judgment in that case. You can review copies of the briefs at: <http://www.search.txcourts.gov/Case.aspx?cn=11-0265>.

It is my opinion (as was argued in the Texas case) that states should adopt the Neutral Principles approach in church property disputes. As the United States Supreme Court wrote in *Jones v. Wolf*, this approach “relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” 443 U.S. 595, 603 (1979). The approach is also “flexible,” allowing people of faith the freedom to arrange affairs as they wish, thereby taking advantage of “the peculiar genius of private-law systems.” *Id.* Indeed, the only time Neutral Principles and any other approach reach different outcomes is when a church seeks to contradict what its own deeds and charters say.

Without Neutral Principles, the alternative Deference approach requires courts to determine where a church places ultimate authority for property disputes, and then defer to any judgment that authority has made. That is difficult in many churches. For example, the word “Episcopal” means bishop and no one can preach, baptize, marry, or bury anyone in an Episcopalian diocese without the local bishop’s consent, not even the Presiding Bishop of the national church. That would seem to make the local bishop the ultimate authority on who owns church property in a diocese, yet the parties in our case filed competing 70-page affidavits from qualified church experts disputing this question.

As shown by the chart attached hereto that was filed with the Texas Supreme Court, the national trend toward Neutral Principles is overwhelming. No state supreme court to consider the matter in the last 20 years has rejected Neutral Principles. While the Kansas case noted in the

chart appears to adopt Neutral Principles, it remains one of the few states that has never adopted that approach by name.

In addition to the advantages noted in *Jones v. Wolf*, adopting Neutral Principles to clarify church property titles is important because of the legal costs that can be incurred if title is uncertain. In the Texas case, the parties had to argue the case under both the Neutral Principles and Deference approaches because it was unclear what approach the Texas Supreme Court would adopt. The Episcopal Church's summary judgment motion in the Texas case was 1,470 pages thick, and the appellate record included over 7,000 pages. Millions of dollars in fees were incurred. In my opinion, knowing which approach governed Texas law might have cut the briefing, record, and expenses in half.

There are, of course, some church disputes to which Neutral Principles cannot apply. For example, courts generally cannot interfere in a church's decision about hiring or firing ministers. *Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C.*, 132 S.Ct. 694 (2012). But property deeds rarely involve doctrinal or religious matters, and state property, corporate, and trust laws don't either. I would urge the Kansas legislature, or any other considering the matter, to follow the national trend and adopt the Neutral Principles approach.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Scott Brister", with a long horizontal flourish extending to the right.

Scott A. Brister

State	Neutral Principles?	Case Citation	Controlling Language
Alabama	Yes	<i>African Meth. Epis. Zion Church v. Zion Hill Meth. Church, Inc.</i> , 534 So.2d 224, 225 (Ala. 1988)	"Alabama courts must use 'neutral principles of law' in adjudicating church property cases"
Alaska	Yes	<i>St. Paul Church, Inc. v. Bd. of Trs.</i> , 145 P.3d 541, 553 (Alaska 2006)	"Considering ... the compelling logic of the opinion of the majority of the United States Supreme Court in <i>Jones</i> , we adopt the neutral-principles approach when resolving property disputes"
Arizona	Yes	<i>Rashedi v. General Bd.</i> , 54 P.3d 349, 353 (Ariz. Ct. App. 2002)	"[W]hen a church-related dispute can be resolved by applying neutral principles of law without inquiry into religious doctrine and without resolving a religious controversy, the civil courts may adjudicate the dispute."
Arkansas	Yes	<i>Ark. Presbytery v. Hudson</i> , 40 S.W.3d 301, 306 (Ark. 2001)	"We now expressly adopt the neutral-principles approach outlined by the United States Supreme Court in <i>Jones</i> . . ."
California	Yes	<i>In re Episcopal Church Cases</i> , 198 P.3d 66, 79 (Cal. 2009)	"[T]o the extent the court can resolve a property dispute without reference to church doctrine, it should apply neutral principles of law."
Colorado	Yes	<i>Bishop and Diocese of Colorado v. Mote</i> , 716 P.2d 85, 96 (Colo. 1986)	"We conclude that the neutral principles approach is preferable, and we adopt that analytical method as the law to be applied by Colorado courts"
Connecticut	Yes	<i>Episcopal Church in Diocese v. Gauss</i> , 28 A.3d 302, 316 (Conn. 2011)	"[W]e conclude that the neutral principles of law approach is preferable . . ."
Delaware	Yes	<i>East Lake Meth. Epis. Church, Inc. v. Trs.</i> , 731 A.2d 798, 810 (Del. 1999)	"We agree with the analysis conducted by the Court of Chancery under its neutral principles of law approach."
District of Columbia	Yes	<i>Meshel v. Ohev Sholom Talmud Torah</i> , 869 A.2d 343, 354 (D.C. 2005)	"[C]ivil courts may resolve disputes involving religious organizations as long as the courts employ 'neutral principles of law'"
Florida	Yes	<i>Word of Life Ministry, Inc. v. Miller</i> , 778 So.2d 360, 362 (Fla. Dist. Ct. App. 2001)	"Since the present case implicates neutral legal principles only, precedent supports judicial resolution of the parties' dispute . . ."
Georgia	Yes	<i>Rector, Wardens, Vestrymen v. Bishop</i> , 718 S.E.2d 237, 241 (Ga. 2011)	"To avoid First Amendment concerns, Georgia courts apply 'neutral principles of law'"
Hawaii		<i>no cases</i>	
Idaho		<i>no cases</i>	

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Illinois	Yes	<i>Marsaw v. Richards</i> , 857 N.E.2d 794, 800-01 (Ill. App. Ct. 2006)	"Following the analysis used in <i>Jones</i> , Illinois courts have adopted the 'neutral principles of law' approach"
Indiana	Yes	<i>Presbytery of Ohio Valley, Inc. v. OPC, Inc.</i> , 940 N.E.2d 1188, 1194 (Ind. Ct. App. 2010)	"We ... decline the Appellants' invitation to apply the polity approach. Instead, we will proceed . . . with the neutral principles of law approach."
Iowa	Yes	<i>Freedom Church v. Central Dist. Conf.</i> , 734 N.W.2d 487 (Table), at *4 (Iowa Ct. App. 2007)	"We find the neutral principles approach is better-suited to the resolution of this church property dispute. We accordingly apply neutral principles"
Kansas	Yes	<i>Gospel Tabernacle Body v. Peace Publishers & Co.</i> , 506 P.2d 1135, 1137 (Kan. 1973)	"The law recognizes the distinction between the church as a religious group ... and the church as a corporation owning real estate . [I]n the latter the activities of the church are subject to the same laws as those in secular affairs."
Kentucky	?	<i>Bjorkman v. Protestant Epis. Church</i> , 759 S.W.2d 583, 585-86 (Ky. 1988); <i>but cf. Cumberland Presbytery v. Branstetter</i> , 824 S.W.2d 417, 419-22 (Ky. 1992)	[T]he application of neutral-principles appears to be preferable to compulsory deference since in every case, regardless of the facts, compulsory deference would result in the triumph of the hierarchical organization."
Louisiana	Yes	<i>Fluker Community Church v. Hitchens</i> , 419 So.2d 445, 447 (La. 1982)	"[W]e think the [First Amendment] safeguards ... necessitate our adoption of the 'neutral principles' approach."
Maine	Yes	<i>Attorney General v. First United Bapt. Church</i> , 601 A.2d 96, 99 (Me. 1992)	"We have held that a suit for an accounting of church funds is a property dispute capable of resolution by application of neutral principles of law."
Maryland	Yes	<i>From the Heart Church v. African Meth. Epis. Zion Church</i> , 803 A.2d 548, 565 (Md. 2002)	"This issue must be resolved . . . by applying 'neutral principles of law, developed for use in all property disputes . . ."
Massachusetts	Yes	<i>Maffei v. Roman Catholic Archbishop</i> , 867 N.E.2d 300, 310 (Mass. 2007)	"We have jurisdiction over church property disputes if and to the extent . . . that they are capable of resolution under 'neutral principles of law'"
Michigan	Deference, w/ exceptions	<i>Lamont Community Church v. Lamont Christian Reformed Church</i> , 777 N.W.2d 15, 28 (Mich. Ct. App. 2009)	"Michigan law provides that courts should generally use the hierarchical method. . . . However, the neutral principles of law method may be appropriate in situations such as those where 'it appears from the church constitution, canons or rules, or from some other source, that an express trust exists. . . ."
Minnesota	Yes	<i>Piletich v. Deretich</i> , 328 N.W.2d 696, 701 (Minn. 1982)	"Finding present Minnesota law to be harmonious with the neutral principles of law approach, we now formally adopt this approach . . ."

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Mississippi	Yes	<i>Schmidt v. Catholic Diocese</i> , 18 So.3d 814, 824 (Miss. 2009)	"Mississippi has adopted the 'neutral principles of law' approach for resolving church property disputes."
Missouri	Yes	<i>Presbytery v. Jaeggi</i> , 682 S.W.2d 465, 467 (Mo. 1984); <i>Church of God in Christ, Inc. v. Graham</i> , 54 F.3d 522, 526 (8th Cir. 1995).	"This Court now adopts the 'neutral principles of law' approach as the exclusive method for resolution of church property disputes."
Montana	Yes	<i>Hofer v. Montana Dept. of Pub. Health</i> , 124 P.3d 1098, 1103 (Mont. 2005)	"We have held that a court may resolve church property disputes by applying neutral, secular principles of property, trust, and corporate law . . ."
Nebraska	Yes	<i>Medlock v. Medlock</i> , 642 N.W.2d 113, 128-29 (Neb. 2002)	"[T]here are neutral principles of law, developed for use in all property disputes, which can be applied . . ."
Nevada	Both?	<i>Tea v. Protestant Epis. Diocese of Nev.</i> , 610 P.2d 182, 184 (Nev. 1980)	"[T]he responsible authority in the church hierarchy asserted control over the property in question, and nothing in the internal regulations of the church or in the statutes of this state indicated that a local congregation could withdraw from the general church and retain control of church property, the district court properly deferred to the ecclesiastical authority's decision."
New Hampshire	Yes	<i>Berthiaume v. McCormack</i> , 891 A.2d 539, 547 (N.H. 2006)	"Although we adopted a neutral principles test . . . we did not define what kinds of documents we would consider in applying it."
New Jersey	Trend to Neutral Principles	<i>Scotts African Union Meth. Prot. Church v. Conf. of African Union First Colored Meth. Prot. Church</i> , 98 F.3d 78, 94 (3d Cir. 1996)	"The New Jersey cases we have examined show a decided progression of New Jersey court decisions toward adoption of a neutral-principles approach in resolving intrachurch property disputes"
N. Mex.		<i>no cases</i>	
New York	Yes	<i>Blaudziunas v. Egan</i> , 2011 WL 6153103, at *2 (N.Y. 2011)	"[R]eligious bodies are to be left free to decide church matters for themselves, ... save for matters that can be resolved through ... 'neutral principles of law.'"
North Carolina	Yes	<i>Harris v. Matthews</i> , 643 S.E.2d 566, 570 (N.C. 2007)	"[C]ourt review should be limited to questions that can be 'resolved on the basis of [neutral] principles of law'"
N.Dak.		<i>no cases</i>	
Ohio	Yes	<i>Hudson Presb. Church v. Eastminster Presb.</i> , 2009 WL 249791, at *2 (Ohio Ct.App. 2009)	"A court may exercise its jurisdiction over a church dispute if it is able to resolve the dispute by employing neutral principles of law."

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Oklahoma	Yes	<i>Griffin v. Cudjoe</i> , 276 P.3d 1064, 1069 (Okla.Civ.App. 2012)	"Plaintiffs have alleged a simple claim of misappropriation of funds, which is proscribed by valid neutral laws ."
Oregon	Yes	<i>Hope Presb. Church v. Presb. Church (USA)</i> , ___ P.3d ___, 2012 WL 5956177 (Or. 2012)	"We agree that the neutral principles approach has advantages over the hierarchical deference approach For those reasons, we apply here the neutral principles approach for resolving church property disputes."
Penn.	Yes	<i>In re Church of St. James the Less</i> , 888 A.2d 795, 805-06 (Pa. 2005)	"Following the Supreme Court's decision in <i>Jones</i> , numerous states, including this Commonwealth, adopted the neutral principles of law analysis . . ."
R.I.		<i>no cases</i>	
South Carolina	Yes	<i>All Saints Parish Waccamaw v. Prot. Epis. Church</i> , 685 S.E.2d 163, 171 (S.C. 2009)	"South Carolina courts are to apply the neutral principles of law approach as approved by the Supreme Court of the United States in <i>Jones v. Wolf</i> ."
South Dakota	Yes	<i>Foss v. Dykstra</i> , 342 N.W.2d 220, 222 (S.D. 1983)	"[W]hen a hierarchical church is involved in a property dispute that the neutral principles of law approach applies...."
Tennessee	Yes	<i>Avondale Church Of Christ v. Merrill Lynch</i> , 2008 WL 4853085, at *9 (Tenn.Ct.App. 2008)	"[W]hen our courts have taken jurisdiction . . . they have been careful to decide . . . using neutral principles of law ."
Utah	Yes	<i>Jefferies v. Stubbins</i> , 970 P.2d 1234, 1250-51 (Utah 1998)	"[C]ourts must treat property disputes between religious factions 'in the same manner they treat disputes among other voluntary associations.'"
Vermont		<i>no cases</i>	
Virginia	Yes	<i>Reid v. Gholson</i> , 327 S.E.2d 107, 112 (Va. 1985)	"[T]here are neutral principles of law , developed for use in all property disputes, which can be applied without 'establishing' churches . . ."
Washington	Yes	<i>Kidisti Sekkassue Orthodox Eritrean Church v. Medin</i> , 118 Wash. App. 1022, 2003 WL 22000635, at *9 (Wash. Ct. App. 2003)	"Washington law allows courts to regulate secular matters in church disputes by civil or criminal law, provided that neutral principles of law are applied."
West Virginia	No	<i>Original Glorious Church of God v. Myers</i> , 367 S.E.2d 30, 34 (W.Va. 1988)	"[U]nder the judicial deference approach, which is the analysis currently used by this Court, there was ample evidence to support the trial court's findings."
Wisconsin	Yes	<i>Wisconsin Conf. Bd. of Trs. v. Culver</i> , 627 N.W.2d 469, 475-76 (Wis. 2001)	"We address church property disputes under the neutral principles of law approach outlined by the Supreme Court in <i>Jones v. Wolf</i> ."
Wyoming		<i>no cases</i>	